(1)

91-986

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

CRAIG L. SHERMAN, PETITIONER

V.

UNITED STATES OF AMERICA, ET AL,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROGER LEE SHERMAN
COUNSEL OF RECORD
9306 WEST 87TH TERRACE
OVERLAND PARK, KS 66212
913/642-4809
ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether Petitioner should be discharged from the United States Air Force Reserve. On February 4,1991, the decision of the United States District Court held Petitioner had no Reserve obligation. The Respondents, contrary to the District Court's decision, placed Petitioner in the Reserves to serve until May 28, 1994. Petitioner appealed. The Eleventh Circuit Court of Appeals on August 20, 1991, held the issue of petitioner's discharge was not before them and affirmed the decision of the District court on September 16, 1991.

PARTIES

PETITIONER: Craig L. Sherman

RESPONDENTS: United States of America; Richard Gillis, Major General, Commander of Warner Robins Air Logistic Command; Michael C. Moehlencamp, Colonel, Commander of 5th Combat Communications Group; and Donald B. Rice, Secretary of the Air Force.

TABLE OF CONTENTS

	Page
Opinions Below.....	1
Jurisdiction.....	3
Constitutional Provision Involvement..	4
Statement of the Case.....	4
Reason for Granting the Writ.....	17
Appendix.....	19

TABLE OF AUTHORITIES

Constitutional Provisions

Article I. Section 9, clause 2... 4

Statutes

28 U.S.C. section 1254(1)..... 3

28 U.S.C. section 2241..... 4

28 U.S.C. section 90(b)..... 5

Regulations

32 C.F.R. 41.6(b) (1990 ed)..... 16

Cases

Federal Dept. Stores Inc. v. Moitie 452 U.S. 394, 69 L. Ed 2d 103, 101 S.Ct. 2424 (1981) ... 17

OPINIONS OF COURTS BELOW

Petitioner filed a Writ a Habeas Corpus to obtain a discharge from the United States Air Force. The United States District Court at Macon, Georgia, issued a decision on February 4, 1991. The written decision of the District Court held that the Petitioner had no Reserve obligation. The pertinent part of the decision reads as follows:

> "The petitioner, Craig L. Sherman, is a sergeant in the United States Air Force. He enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only. He entered active duty on November 28, 1986 and was

assigned to the 51st Combat Communications Squadron, 5th Combat Communications Group at Robins Air Force Base, Georgia. His term of active duty was to expire on November 27, 1990."

Thereafter on May 25, 1991, the Respondents placed Petitioner in the Air Force Reserves to serve until May 28, 1994. The Eleventh Circuit Court of Appeals held in their written decision on August 20, 1991, that the issue of Petitioner's discharge was not litigated in the District Court, therefore, not before them and dismissed the appeal. The Appellate Court's decision reads as follows:

"We find that the matters relating to appellant's discharge from the Air Force were not litigated in the district court; therefore, we do not

consider them here, on appeal. All other issues in the case are moot."

On September 16, 1991, the Appellate Court affirmed the decision of the District Court.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals dismissing the appeal was entered August 20, 1991. The judgment of the Eleventh Circuit Court of Appeals affirming the judgment of the District Court was filed September 16, 1991. The jurisdiction of the United States Supreme Court for the Writ of Certiorari is invoked pursuant to 28 U.S.C section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Article I, Section 9, clause 2 of the United States Constitution. Said section reads as follows:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATEMENT OF THE CASE

Petitioner filed a Writ of Habeas Corpus in the United States District Court at Macon, Georgia on January 25, 1991. The District Court had jurisdiction pursuant to 28 U.S.C. section 2241. Petitioner and the appropriate Respondents were within the territorial jurisdiction of the District Court 28 U.S.C. section

90(b). The purpose of the Writ was for the Petitioner to obtain an honorable discharge from the United States Air Force. Petitioner was on active duty in the United States Air Force at the time he filed the Writ of Habeas Corpus. Respondents had involuntarily extended Petitioner's contract of active duty enlistment for an indefinite period due to the war in the Middle East (Desert Storm). Petitioner's contract of enlistment had expired on November 27, 1990 and Petitioner had no Reserve obligation. At the trial in the District Court the Petitioner testified as to the Reserve Obligation as follows:

Q. Mr. Sherman, I'll hand you what has been marked plaintiff's exhibit 1. What is that, Mr. Sherman?

A. This is an enlistment contract.

Q. And how many pages did I hand you.

A. Two pages.

Q. And Mr. Sherman, have you seen this document before?

A. Yes, I have.

Q. And on the back of that first page, I believe, is that your signature?

A. Yes it is.

Q. And that is dated what?

A. May 29th, 1986.

Q. All right. Is that when you signed that?

A. Yes, it is.

THE COURT: Excuse me just a second. I thought I had a copy. In fact, I know I've seen it, but I can't find it now.

MR. SHERMAN: Let me hand you a copy here, Your Honor.

THE COURT: Oh, here it is. Excuse me. I've got it.

MR. SHERMAN: I don't know that you have both pages.

THE COURT: All right.

MR. SHERMAN: I will also provide counsel with those pages.

Q. By Mr. Sherman: And what was your understanding when you signed that contract of your obligation to the United States Air Force?

A. Four years active duty service.

Q. When you signed it on May of 1986, was it then a four year:

A. No, it wasn't.

Q. What was it?

A. It was an eight year Reserve commitment.

Q. Was it your understanding that that would change as time went on?

A. Yes. It was my understanding that when I enlisted in active duty service that would change.

Q. What would it change to?

A. A four year active duty commitment.

Q. And would you have any Reserve to serve after that?

A. No.

Q. All right. I point out to you that on that first page there on Number 8, it does state an eight year commitment in the reserves; is that right?

A. That's right.

Q. And that's the paragraph Number 8; is that true? You'll have to say yes or no.

A. Yes.

Q. And then, Mr. Sherman, on that second page that I handed you, is that your signature on that second page?

A. Yes, it is.

Q. And by your signature, is that--what is the date?

A. Tell me what subsection.

Q. No, what is the date by your signature?

A. May, 29th 1986.

Q. I'm on the second document.

A. All right.

THE COURT: Can you hear the witness? Mr. Goulian can you hear him all right?

MR. GOULIAN: I can hear him.

THE WITNESS: Paragraph 20(a)?

Q. Paragraph 20(a)(b).

MR. SHERMAN: May I approach the witness and point out the paragraph, Your Honor?

THE COURT: Yes, and you are going to have to do it for me. Mine stops with 19(a).

(Counsel approaches witness)

THE COURT: All right. Go ahead.

Q. BY MR. SHERMAN: And what is the date by your signature on that 20(a)?

A. November 28th, 1986.

Q. So you signed the document first in May of 1986; is that right?

A. Yes.

Q. And is this the one that states that you went in for four years?

A. Yes.

Q. And it does state that in 20(a), to your opinion

A. Yes.

Q. And then in 21(a), what does that state?

A. That I am discharged from the Reserve Component shown in Item 8 and accepted in regular order, United States Air Force.

Q. Now, then that says Reserve Component shown in Item 8?

A. That's right.

Q. Is that what Item 8 on that first page that you talked about where your signature was in May?

A. Yes.

Q. Okay. So that is the one, the paragraph that says you have an eight year commitment to the

Reserves and then on the next page where it says you are discharged from that eight year commitment; is that your understanding?

A. Yes.

Q. You have no Reserve commitment after you have served your four years in the regular Air Force; is that your understanding?

A. Yes.

MR. SHERMAN: Offer into evidence, Your Honor, Petitioner's Exhibit 1.

THE COURT: Mr. Goulian, any objections?

MR. GOULIAN: Your Honor, I don't have any cross because I think everything he said is irrelevant to the proceedings.

THE COURT: Do you have any objection to his tendering of this enlistment contract?

Mr. GOULIAN: No, no objection.

THE COURT: How many pages is it?

MR. SHERMAN: Let the record show that this is a two-page document, but there is printing on both sides. So when the copies are made, there are four copies.

THE COURT: All right. Make sure yours and mine--all right. Plaintiff's Exhibit 1, Petitioner's Exhibit 1 is admitted without objection.

In accordance with the testimony the District Court on February 4, 1991 issued its judgment which reads in pertinent part as follows:

"The petitioner, Craig L. Sherman, is a sergeant in the United States Air Force. He enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only. He entered active duty on November 28, 1986, and was assigned to the 51st Combat Communications Squadron, 5th Combat Communications Group at Robins Air Force Base, Georgia. His term of active duty was to expire on November 27, 1990."

Although the District court ruled in favor of the Petitioner that (1) his contract of enlistment expired on November 27, 1990, and (2) he had no Reserve obligation, the District Court denied the

petitioner a discharge holding the President had authority to involuntarily extend enlistments due to the war in the Middle East. Further, the District Court judgment reads in pertinent part as follows:

> " If the law were clear that Petitioner is entitled to be discharged, then this court would order him discharged."

The Petitioner appealed the judgment of the District Court. The Respondents did not appeal the District Court judgment. Before Petitioner's appeal came to a hearing in the Eleventh Circuit Court of Appeals, the Middle East war ended. Respondents issued Petitioner an Honorable Release from active duty beginning May 25, 1991, but placed Petitioner in a Reserve obligation until May 28, 1994. The Petitioner presented only one issue at the

appeal hearing held August 14, 1991, and that issue was "Whether petitioner is entitled to an honorable discharge upon release from active duty." The term discharge is defined at 32 CFR 41.6(b) (1990 ed) as complete severance from all military status gained by the enlistment or induction concerned. On August 20, 1991, the appellate court in its written decision held:

> "We find that the matters relating to appellant's discharge from the Air Force were not litigated in the district court; therefore, we do not consider them here, on appeal. All other issues in the case are moot."

The appellate court's written judgment filed September 16, 1991, affirmed the District court decision. Although the District Court held the Petitioner had no

Reserve Obligation, the Appellate Court refused to discharge the Petitioner from the Reserves.

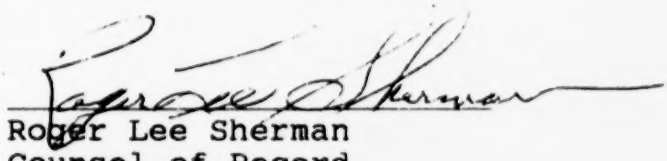
REASON FOR GRANTING THE WRIT

This case should be heard by the United States Supreme Court because the Petitioner has no other remedy. This case is Res Judicata as to all courts of the United States except this Supreme Court. Federal Dept. Stores Inc. v. Moitie 452 U.S. 394, 69 L. Ed 2d 103, 101 S. Ct. 2424 (1981)

The Federal District court has ruled the Petitioner has no Reserve obligation. In disregard of the District court ruling the Respondents placed Petitioner in a Reserve obligation until May 28, 1994. The Court of Appeals affirmed the District Court decision. The District court decision therefore remains valid and,

therefore Petitioner has no Reserve obligation. Petitioner has no means to enforce the District Court decision except by this petition to the United States Supreme Court.

Furthermore, the Eleventh Circuit Court of Appeals was in error in their judgment that the issue of Petitioner's discharge was not tried in the District Court. The entire proceeding on the Writ of Habeas Corpus before the District Court was on the issue of Petitioner's discharge as evidenced by the wording of the judgment of the District Court.



Roger Lee Sherman
Counsel of Record
9306 West 87th Terrace
Overland Park, KS 66212
913/642-4809
Attorney for Petitioner

APPENDIX

1. Judgment dated February 4, 1991, of the United States District Court for the Middle District of Georgia.
2. Judgment dated August 20, 1991, of the Eleventh Circuit Court of Appeals.
3. Judgment filed September 16, 1991, of the Eleventh Circuit Court of Appeals.

IN THE UNITED STATES DISRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

CRAIG L. SHERMAN,	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION
UNITED STATES OF AMERICA,	:	NO. 91-33-3-
ET AL.,	:	MAC (DF)
Defendants.	:	

JUDGMENT

Pursuant to the order of this court which was dated and filed February 4, 1991, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

Judgment is therefore entered in favor of the defendants.

This 4th day of February, 1991.

GREGORY J. LEONARD, Clerk
By: (SIGNED)
Elaine W. Jones
Deputy Clerk

Filed at 5:28 p.m.
February 4, 1991
Deputy Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

CRAIG L. SHERMAN,	:	
Petitioner,	:	
vs.	:	CIVIL ACTION
UNITED STATES, et al.,	:	FILE NO.
Respondents	:	91-33-3-MAC (DF)

FITZPATRICK, District Judge

This petition for a writ of habeas corpus presents the court with an important question concerning the armed forces at a time when our nation is engaged in a war in the Middle East. More specifically, the issue is whether the President has the authority under 10 U.S.C. Section 673c to involuntarily extend the term of enlistment for an active member of the Air Force. The court holds that he does, and so the petition is DENIED.

I. BACKGROUND

The petitioner, Craig L. Sherman, is a sergeant in the United States Air Force. He enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only. He entered active duty on November 28, 1986, and was assigned to the 51st Combat Communications Squadron, 5th Combat Communications Group at Robins Air Force Base, Georgia. His term of active duty was to expire on November 27, 1990.

An unforeseeable series of events intervened. On August 2, 1990, Iraq invaded and occupied Kuwait. On that same day, President George Bush issued Executive Order 12722, declaring a national emergency. Executive Order 12728, issued on August 22, delegated the

President's authority under 10 U.S.C. Section 673c to the Secretary of Defense. That same Order allows the Secretary of Defense to redelegate this authority without the approval of the President. The Secretary passed this power to the Secretary of the Air Force, who in turn delegated it to the Assistant Secretary for Manpower, Reserve Affairs, Installations and Environment, who then announced the suspension of those provisions of law and Air Force policy relating to the separation, retirement and promotion of personnel deemed to be in an essential category by the Secretary of Defense. This same procedure was followed with later executive orders authorizing the calling up of other reserve units and the extension of their terms of service.

This plan, known as a "Stop Loss" program, originally applied to personnel with dates of separation or retirement

between October 2 and December 31, 1990, although the latter date was given as tentative in an announcement of September 17, 1990. This same announcement identified those personnel whose units or Air Force Specialty Codes (AFSC), which are numerical designations of job titles, were essential to national security and therefore subject to the Stop Loss program. A later statement extended Stop Loss indefinitely past December 31 and deleted Petitioner's AFSC from the list of critical skills, although his unit remained designated as essential. After the deadline declared by the United Nations for Iraq to leave Kuwait passed on January 15, war began on the next day. A January 25, 1991, announcement removed Petitioner's unit from the list of critical units but adding his AFSC back to the list of critical skills.

These events had a direct impact on the Petitioner. His unit was shipped to Saudi Arabia on August 16, 1990, but he was left behind due to a broken finger. Before the Stop Loss program was implemented he volunteered, for unexplained reasons, to rejoin his unit, but permission was denied since he had so little time left on his enlistment contract and did not wish to extend it. After the Stop Loss order went into effect, Petitioner in the latter part of October or the first of November orally applied for a hardship waiver, which was denied. He then took three weeks' leave to be married. After receiving his second Stop Loss order, Petitioner filed a written request for a waiver on January 10, 1991, and then again went on leave, returning on January 25, the same day this petition was filed. On January 28,

Petitioner received notice that his second request was also denied and that he was shortly to be shipped overseas.

Since this is a matter requiring the immediate attention of this court due to the fact that Petitioner's orders have already been sent directing him to depart Robins Air Force Base for duty with Operation Desert Storm in the Kingdom of Saudi Arabia on February 8, 1991, the court will not delay its ruling on the writ of habeas corpus and will instead issue its order forthwith.

II. DISCUSSION

The first issue raised by the Petitioner concerns which statute controls his case. He contends that the controlling statute is 50 App. U.S.C. Section 454(c)(1), which forbids involuntary extensions of enlistments without a declaration of war or national

emergency by Congress, while the government relies on 10 U.S.C. Section 673c (West Supp. 1990). The court is persuaded that Section 673c controls, in part because it was enacted at a later date, and the court is willing to believe that Congress was well aware of the existence of Section 454 while considering Section 673c, and so took the older statute into consideration. Contrary to Petitioner's claims, the court finds that Section 673c acts as a specific exception to the prohibition on involuntary extensions found in Section 454, a broader and more general statute. Section 673c therefore controls this case.

The question to be decided by the court is whether section 673c gives the President the authority to extend the enlistment of an active duty Air Force enlisted man as well as a member of the

Air Force Reserve. The statute reads:

> Notwithstanding any other provision of law, during any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 672, 673 or 673b of this title, the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.

10 U.S.C.A. Section 673c(a) (West Supp. 1990). (Sections 672, 673 and 673b, to which the statute refers, concern reserve components generally, the ready reserve

and selected reserve, respectively.) The answer to the question asked above is "yes."

The Petitioner contends that since the statute begins by referring to members of a reserve component, the rest of it must be read to concern the reserves only. This court cannot, however, read the statute in that manner. Although the statute begins by referring to the reserves, it ends by referring to "any member of the armed forces who the President determines is essential to the national security of the United States." A more logical reading would lead to the conclusion that Congress intended to provide for the authority of the President to extend the enlistment of members of the armed forces, regular or reserve, if and when "members of a reserve component are serving on active duty pursant to an

order to active duty." The statute ends after stating that the President may suspend any provision of law relating to separation applicable to any member of the armed forces who the President determines is essential to national security.

The legislative history of the statute clearly indicates the will of Congress by the use of the following language:

> "The effectiveness of the President's call-up authority is weakened furher by the normal separation or retirement of regular and reserve personnel. At the very time that he has augmented the active forces to respond to a crisis, the President lacks the authority to prevent the loss of regular and reserve personnel who become

eligible to separate or retire

from the military services....

Sen. No. 98-174, 98th Cong., 1st Sess, 2, reprinted in 1983 U.S. Code Cong. & Admin. News, 1081, 1098 (emphasis added).

The Petitioner has also challenged the determination that he is essential to national security as required by the statute. The court is not willing to challenge this finding. In a time of war, the military decisions made by the President and the executive branch carry a special weight. Such decisions have been left to the discretion of the President by the very language of Section 673c, and this court would be overstepping its bounds to challenge such a decision. Moreover, although Petitioner has labored mightily to show that he is not essential, the government has presented convincing evidence that he is.

Furthermore, adopting the Petitioner's reading of Section 673c would lead to an illogical and inequitable result. It would make little sense to say that the President is allowed to call up or extend the enlistments of reservists in case of war but that he cannot do so for active duty personnel. Although the Petitioner has claimed that extending his enlistment would cause him undue hardship, this court is well aware of the even greater hardships experienced by members of the reserves who have been taken away from their families and civilian careers. In a time of war it would be terribly unfair and unreasonable to allow such disruptions to affect reservists, but not members of the regular armed forces.

In a nutshell, the Petitioner has asked this court to order the termination of his contract as an enlisted man in the

United States Air Force in time of war, a decision which would trigger lawsuits and claims by other military personnel similarly situated and bring chaos to orderly military planning. If the law were clear that the Petitioner is entitled to be discharged, then this court would order him discharged. In this opinion of this court, however, the law does not favor the Petitioner and it would be unreasonable to read the statute that way. The language of the statute, its legislative history, the discretionary decisions made by the executive branch and basic notions of fairness all convince the court that the Petitioner's case must fail. Accordingly, the petition for a writ of habeas corpus is DENIED.

SO ORDERED, this 4th day of February, 1991.

(signed)

DUROSS FITZPATRICK, JUDGE

UNITED STATES DISTRICT COURT

MEM/bb

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8204

D. C. Docket No. CIV91-33-3-MAC (DF)

CRAIG L. SHERMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA;
RICHARD GILLIS, Major General,
Commander of Warner Robins Air
Logistic Command; MICHAEL C. MOEHLENKAMP,
Colonel, Commander of 5th Combat
Communications Group and DONALD B. RICE,
Secretary of Air Force,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

(August 20, 1991)

Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

We find that the matters relating to appellant's discharge from the Air Force were not litigated in the district court; therefore, we do not consider them here, on appeal. All other issues in the case are moot.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8204

D. C. Docket No. CIV91-33-3-MAC (DF)

CRAIG L. SHERMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA;
RICHARD GILLIS, Major General,
Commander of Warner Robins Air
Logistic Command; MICHAEL C. MOEHLENKAMP,
Colonel, Commander of 5th Combat
Communications Group and DONALD B. RICE,
Secretary of Air Force,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

---

Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge and HENDERSON, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: August 20, 1991

For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb

Deputy Clerk

ISSUED AS MANDATE: Sept. 16, 1991